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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967.

No. 606

KATHLEEN K. WILKIN,

Petitioner,

vs.

SUNBEAM CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 377 F. 2d 344 (1967). Such opinion affirmed the judgment of the United States District Court for the District of Kansas, which was entered in accordance with a jury verdict in favor of Respondent and against Petitioner. A petition for rehearing was denied by the Court of Appeals on June 12, 1967, and its mandate was spread on June 26, 1967.

JURISDICTION.

Jurisdictional requisites are set forth in the Petition.

QUESTION PRESENTED.

In a situation where Petitioner, after filing a patent application, solicited many companies on a non-confidential basis and thereafter similarly solicited Respondent, and voluntarily showed Respondent the specification portion of such patent application and a working model of a sealed sandwich maker (Wilkin device) to determine if Respondent was interested in acquiring any rights in such patent application, and where Respondent declined Petitioner's offer to acquire any such rights and where, some four years later, Respondent developed and marketed through its own people, who never saw or heard of the Wilkin device or patent application, a somewhat similar device (Sunbeam Party Grill), and where Petitioner brought suit claiming she disclosed a novel device to Respondent in confidence which was used by Respondent to her detriment and where, after trial of such issues a jury verdict determined that Petitioner did not make any disclosure in confidence, did not have a novel device but only one old in the art and well known to Respondent and that Respondent did not use anything disclosed to it by Petitioner;

And in the further situation where, in connection with the consideration of another disclosure from a different party, some fifteen months after the initial nonconfidential disclosure hereinbefore mentioned, Respondent's patent attorney obtained, also on a nonconfidential basis, from Petitioner's patent attorney, through an independent investigator, information: (1) that no claims had been allowed to Petitioner; and (2) that her device had not been commercially exploited; then

Is the manufacturer, Respondent herein, liable to Petitioner as a result of such second disclosure made by her patent attorney?

STATEMENT.

This is, as Petitioner asserts, a misappropriation case. It was tried in the United States District Court for the District of Kansas, where jurisdiction lay because of diversity of citizenship with the requisite amount in controversy.

In a formal pretrial order, the parties agreed that the issues to be tried were:

1. Whether anything was disclosed in confidence by Plaintiff to Defendant;
2. Whether what was disclosed was novel to Defendant; and
3. Whether Defendant used anything disclosed to it by Plaintiff in the Sunbeam Party Grill (R. 87).*

Trial was had on these stipulated issues as contained in such formal pretrial order, Petitioner introducing evidence as to the building of the Wilkin device, the demonstration made to Respondent in 1957 and her assertion that the Sunbeam Party Grill, marketed over four years after said demonstration, embodied her disclosure. Respondent offered evidence to show that the disclosure made to it by Petitioner was on a nonconfidential basis; that there was nothing novel involved in the disclosure since what was disclosed was old in the art and well known to Respondent; and that the Sunbeam Party Grill was developed by Respondent through its own development team, none of whom had ever heard of or seen the Wilkin device or the Wilkin patent application prior to the trial. The trial developed other facts, including that Petitioner had made a noncon-

* Throughout this Brief "R...." shall denote the Record in the Court of Appeals, "EX...." shall denote the trial Exhibits, and "P...." shall denote the Petition.

fidential disclosure of her device to many others in addition to Respondent; that no manufacturer was interested in her device since each believed it old in the art; that no patent was ever obtained by Petitioner; and that the patent application was abandoned after rejection by the United States Patent Office.

The stipulated issues were submitted to a jury under appropriate instructions, and the jury returned a verdict in favor of Respondent, thus determining that there was no confidential disclosure; that there was no novelty; and that Respondent did not use in its Sunbeam Party Grill anything disclosed to it by Petitioner.

Certainly no question for this Tribunal arises from the situation so far detailed above. Petitioner's alleged question for review here arises as the result of her unsuccessful attempt to inject a fourth issue into the case, which issue was set out in the formal pretrial order as follows:

> 4. Whether the defendant by employing improper means in September and/or October, 1958 obtained from the plaintiff business information or trade secrets; if such finding results, then issues 1, 2 and 3* shall be thereby resolved in favor of the plaintiff (R. 87).

Respondent contended below that no such issue existed; that it at no time employed any improper means; that Petitioner had no business information or trade secrets; and that Petitioner's proposed new cause of action was barred by the statute of limitations (R. 88).

The crux of Petitioner's assertion as to her proposed fourth issue arose from certain communications in October, 1958 between U. O. Cumming, an independent investigator employed by Respondent, and John Widdowson, Petitioner's patent attorney, with all pertinent communications

* The three issues stipulated in the formal pretrial order which are quoted hereinabove at page 3.

being by correspondence. Cumming dealt with Widdowson under the name of Robert Laird, which name Cumming had filed as an assumed name pursuant to the statutes of New York, where he resided.

For the convenience of the Court, Respondent has placed this exchange of correspondence in Appendix A hereto. This correspondence took place shortly after a similar exchange between Petitioner's same patent attorney and the patent attorney for Star Manufacturing Company, one of the many companies Petitioner tried unsuccessfully to interest in her device. This correspondence has been placed in Appendix B hereto.

Respondent, as may readily be determined by examining the correspondence (Appendix A), had simply asked the independent investigator to determine whether any claims had been allowed in Petitioner's patent application and whether her device had been marketed. As shown by the correspondence and by Cumming's testimony introduced at the trial, his report was that no claims had been allowed and that the device had not been marketed. This is the whole of the matter. Petitioner offered no evidence whatsoever as to the existence of any trade secrets allegedly improperly obtained by Respondent. The patent application and the Wilkin device cannot be the trade secrets allegedly improperly obtained in 1958 since Petitioner now admits that Respondent obtained these "trade secrets" by proper means in 1957 (P. 31). Petitioner should not now be heard to argue that Respondent obtained by improper means the very "trade secrets" it already had in its possession and which it had been freely given by Petitioner.

REASONS FOR DENYING THE WRIT.

1. The decision below is not in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Seismograph Service Corp.* v. *Offshore Raydist, Inc.*, 263 F. 2d 5 (1958) "on the same matter".

2. The decision below is manifestly correct. The facts were determined by a jury. The legal principles applied both by the Court below and by the trial court are well settled and recognized by many of our Courts of Appeal. *Official Airlines Schedule Information Service, Inc.* v. *Eastern Air Lines, Inc.*, 333 F. 2d 672 (5th Cir. 1964); *Boop* v. *Ford Motor Company*, 278 F. 2d 197 (7th Cir. 1960); *Mitchell Novelty Co.* v. *United Mfg. Co.*, 199 F. 2d 462 (7th Cir. 1952); *De Filippis* v. *Chrysler Corporation, et al.*, 159 F. 2d 478 (2d Cir., 1947), cert. denied, 331 U. S. 848; 67 S. Ct. 1733, 91 L. Ed. 1857 (1947); *Van Rensselaer* v. *General Motors Corp.*, 324 F. 2d 354 (6th Cir. 1963). Such principles, plus the jury's resolution of the facts, properly determined the stipulated issues.

ARGUMENT.

I.

THERE IS NO CONFLICT ON THE SAME MATTER BETWEEN THE OPINION BELOW AND THAT OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT IN SEISMOGRAPH SERVICE CORP. v. OFFSHORE RAYDIST, INC., 263 F. 2d 5. EACH CASE TURNS ON ITS OWN PECULIAR SET OF FACTS AND INVOLVES AN APPLICATION OF STATE, NOT FEDERAL, LAW.

The principles involved in this case, admittedly a misappropriation case (P. 4), are well settled. While this action involves state rather than federal law and was tried in the Federal Court purely because of diversity with the requisite amount in controversy, the elements which Petitioner must show for recovery are well settled and have been determined in at least four circuits. *Official Airlines Schedule Information Service, Inc.* v. *Eastern Air Lines, Inc., supra; Boop* v. *Ford Motor Company, supra; Mitchell Novelty Co.* v. *United Mfg. Co., supra; De Filippis* v. *Chrysler Corporation, et al., supra;* and *Van Rensselaer* v. *General Motors Corp., supra.* These elements are fully embodied in the issues set forth in the pretrial order herein, namely:

1. Whether anything was disclosed in confidence by plaintiff to defendant;
2. Whether what was disclosed was novel to defendant; and
3. Whether defendant used anything disclosed to it by plaintiff in the Sunbeam Party Grill.

These questions were submitted to and determined by the jury. Their determination resulted in the judgment of the

United States District Court for the District of Kansas which was affirmed below. It is, therefore, established that Petitioner did not disclose anything in confidence to Respondent; that what Petitioner did disclose was not novel to Respondent; and that Respondent did not use anything disclosed to it by Petitioner in its Sunbeam Party Grill.

This puts Petitioner on the horns of a dilemma. Having failed to prove the requisite elements of a misappropriation case and having offered no cause of action* nor any proof on a trade secret case, Petitioner, in an effort to extricate herself, has devised the theory set forth in the pretial order as the proposed fourth issue, namely:

> "Whether the defendant by employing improper means in September and/or October, 1958, obtained from the plaintiff business information or trade secrets; if such finding results, then issues 1, 2 and 3 shall be thereby resolved in favor of the plaintiff" (R. 87).

It becomes apparent that Petitioner's contention involves a theory that the elements of a misappropriation case can be proved merely by showing "improper" taking of information from Petitioner**. Petitioner's problem is two-fold. First, this is not a trade secret case and ir leed there was no trade secret nor any attempt to prove a trade secret. Second, the trial court instructed the jury in its Instruction 14 as follows:

> "You are instructed that should you find that defendant by employing improper means in September and/or October 1958, obtained or acquired business

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* Obviously because the statute of limitations would have run thereon even if she had any trade secrets on which to base such a cause of action.

** The Court of Appeals in its decision on this point said (377 F. 2d. 346-347):

> "We cannot find authority for this assertion, nor was any cited in appellant's brief".

information and the like from plaintiff, then you may consider such fact along with all the other facts and circumstances you may find to exist in the case in determining whether or not plaintiff disclosed something in confidence to defendant which was novel to defendant and which defendant used in its Sunbeam Party Grill" (R. 112).

This instruction essentially paraphrases what Petitioner attempted to assert in her proposed fourth issue. In finding for Respondent, the jury obviously did not believe that there had been any improper taking. This jury determination is demanded by the factual situation presented. The information sought by Respondent in the fall of 1958 (some three years prior to the marketing of the Sunbeam Party Grill) was given freely by Petitioner's patent attorney. This information was simply that no patent claims were allowed in Petitioner's pending application* and that the Wilkin device had not been marketed. It is obvious from the correspondence that Petitioner's patent attorney not only showed no reluctance to give the information but was perfectly willing to pass it along to anyone who might conceivably show an interest. Just a few months before he had given the same information, and more, to the patent attorneys for Star Manufacturing Company, as disclosed by the Exhibits contained in Appendix B hereto. Of course Petitioner's patent attorney could have refused to divulge any information, but having done so Petitioner should not now be heard to complain that Respondent acquired the information improperly.

Being unable to prove the requisite elements of a misappropriation case, Petitioner now asserts that there is some principle of law in *Seismograph* under which her patent attorney's disclosure of certain miscellaneous infor-

* This was an understatement since the U. S. Patent Office on October 2, 1958 rejected the Wilkin patent application as involving nothing new or novel.

mation to Respondent in 1958 should in some mystical or magical manner result in recovery to Petitioner.

Seismograph is a fact case. Moreover, it depends on the state law either in Oklahoma where Seismograph was located; in Virginia, where Hastings had his laboratory; or in Louisiana, where the case was tried. It is a unique factual situation and the factual situation is utterly unlike that in the instant case.

In *Seismograph,* Hastings conceived of an idea using a two-dimensional heterodyne phase comparison principle as a means of locating on two lines of position an object either in the air or on the ground or over water. He was aware of a basic patent owned by Honore covering the heterodyne phase comparison system but which had never been put to any practical use. Seismograph Service Corporation was in the process of endeavoring to develop a means for quickly and accurately locating an object over water for use by its client, Phillips Petroleum Company, in its off-shore drilling program. Officials of Phillips heard about Hastings and met with him, and he disclosed to them and demonstrated to them his principle and his idea. These officials immediately relayed such information to Seismograph, and particularly to its electronics engineer, Hawkins, who had the primary responsibility for developing a system for Phillips. Therefore, Seismograph and Hawkins learned of the heterodyne phase comparison principle from Hastings. The officials at Seismograph proposed a joint venture relationship with Hastings to develop such principle and put it to practical use and, pursuant thereto, learned in detail of his work, experimentation and the results thereof. They also learned from him that there was a basic patent which such system would infringe and which would have to be acquired, and that Hastings was in the process of acquiring such patent.

Seismograph decided that it would proceed alone with

the information it had gained from Hastings to develop a suitable location system and would itself acquire the basic patent which it knew existed from what Hastings had told it but which he had not named. In the interim and while it was perfecting its system, it deliberately and intentionally left Hastings under the impression that the joint venture proposal was open, while at the same time it was running behind his back locating the basic patent and then the owner of such patent and acquiring it for itself. Additionally, Hawkins, on behalf of Seismograph, immediately applied for a patent on the two-dimensional system and indeed obtained a patent for Seismograph. As a result, Hastings had a location system known as Raydist, and Seismograph had a similar system which it called the Lorac System. Seismograph then brought suit against Hastings' Company, Offshore Raydist, alleging that the Raydist system was infringing the rights of Seismograph and its Hawkins patent as well as the Honore patent which Seismograph had obtained by circumventing Hastings.

Both the District Court and the Court of Appeals, being confronted with this situation, found that the idea of putting the phase comparison heterodyne principle to work was Hastings' and that Hawkins obtained such idea from Hastings and, while holding out a joint venture to Hastings, Seismograph acquired the basic Honore patent. The Courts, therefore, determined that the Hawkins patent was invalid since Hawkins was not the inventor. Because of the manner in which Seismograph had acquired the Honore patent and perfected its own system, it was obliged to license Hastings under the Honore patent. No damages were allowed Hastings.

It seems abundantly clear that in the fact situation confronting the Courts in *Seismograph,* the decision is clearly correct, but it does not aid Petitioner in the instant case. Herein there was no holding out of any joint venture by

Respondent to Petitioner and indeed the jury below determined, with abundant evidence to support its conclusion, that there was no confidential relationship between the parties. In addition, the Wilkin device was neither new nor novel to Respondent. It was familiar with sealed sandwich makers, both electrified and non-electrified, for many years before Petitioner appeared on the scene. The jury below found, on evidence which demands such finding, that nothing novel was disclosed by Petitioner to Respondent. Finally, it was shown that Respondent embarked on its own development program and after some years of research and development came up with its own Party Grill. It did not take anything from Petitioner. Patently the situation in the instant case and the facts as properly found by the trier of the facts below make this an entirely different situation than in *Seismograph*.

There is likewise no support for Petitioner in the other authorities cited. *Tabor* v. *Hoffman*, 118 N. Y. 30, 23 N. E. 12 (N. Y. 1889), involves the patterns for a pump, which patterns the plaintiff kept secret. The defendant learned of the secret by convincing a third party, who had made some repairs to the patterns, to disclose the secret. The secret device was novel and did give the plaintiff a competitive advantage over those who did not have the secret. The situation in the instant case is entirely different since Petitioner's device was without novelty and she did not keep it secret but, on the contrary, was anxious to show it to anyone on a nonconfidential basis.

The only thing new and novel in the instant situation is the theory of Petitioner in her effort to engraft principles from a trade secret case onto a misappropriation case and this even though there is no trade secret and no novelty. Most certainly *Seismograph* does not aid Petitioner in this effort. It involved a completely different factual situation and arose in different states than the instant litigation.

Herein Petitioner is a resident of Kansas, Respondent is a resident of Illinois, and the exchange of correspondence on which Petitioner now bases her whole case took place between Kansas and New York. There are no federal principles involved. Patently there is no conflict "on the same matter" between the Court below and the Court of Appeals for the Fifth Circuit in *Seismograph*. There is no basis for certiorari.

II.

THE COURT BELOW CORRECTLY DETERMINED THE NECESSARY ELEMENTS IN A MISAPPROPRIATION CASE AND INSURED THAT THE CORRECT PRINCIPLES OF LAW WERE APPLIED BY THE TRIER OF THE FACTS. THAT COURT ALSO FOUND THAT THE EVIDENCE AMPLY SUPPORTED THE JUDGMENT RENDERED.

It is a well established principle* that the elements of a misappropriation case are the disclosure in confidence of something novel and the use of such disclosure. The requisite elements were stipulated in the formal pretrial order below (R. 87). The trial court instructed the jury as to these elements and the jury returned its verdict in favor of Respondent. Judgment was entered in accordance therewith, which judgment was affirmed below. The evidence not only supports but demands the conclusion of the jury.

This should end the matter. Petitioner, however, endeavors to have new elements devised for a misappropriation case and borrows from the trade secret field in an effort to support such a new and novel theory. It is her position that if *any* information is obtained improperly,

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* See *Official Airlines Schedule Information Service, Inc.* v. *Eastern Air Lines, Inc.*, supra; *Boop* v. *Ford Motor Company*, supra; *Mitchell Novelty Co.* v. *United Mfg. Co.*, supra; *De Filippis* v. *Chrysler Corporation, et al.*, supra; and *Van Rensselaer* v. *General Motors Corp.*, supra.

whether new and novel or not, the improper taking is of itself sufficient to establish liability and takes the place of a disclosure in confidence of something novel used by Respondent.

There is no support for Petitioner's contention.* Her chief reliance is on the *Restatement of Torts,* Vol. IV, Sections 757 and 759. Such work defines a trade secret as (Vol. IV, p. 5):

> "* * * any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. * * * A trade secret is a process or device for continuous use in the operation of the business. * * *"

Additionally, of course, the subject matter of a trade secret must be secret. Matters of general knowledge cannot be appropriated by anyone as his secret.**

Petitioner did not present any evidence in the case below to support her present contention. First, there was no confidential relationship. Mr. Justice Holmes for this Court found years ago that the existence of a confidential relationship is the starting point in a cause of action such as that which Petitioner now seeks to assert. *E. I. Du Pont de Nemours Powder Co.* v. *Masland,* 244 U. S. 100, 103; 37 Sup. Ct. 575; 61 L. Ed. 1016 (1917). Second, there was no improper taking.

Petitioner's reliance (P. 28) upon *Smith* v. *Dravo Corporation,* 203 F. 2d 369 (7th Cir. 1953) is misplaced. That case does involve trade secrets and the obtaining by the defendant of the plaintiffs' secret process through breach of a confidential relationship but, as the Court pointed out (p. 376):

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* See second footnote p. 8 of this Brief.

** *Restatement,* Vol. IV, page 6, and see *Nickelson* v. *General Motors Corporation,* 361 F. 2d 196 (7th Cir. 1966).

> "Certain it is that a non-confidential disclosure will not supply the basis for a lawsuit. Plaintiffs' information is afforded protection because it is secret. Promiscuous disclosures quite naturally destroy the secrecy and the corresponding protection."

Petitioner did not have any trade secret. She had no idea which was novel and which she kept as a secret, as is pointed out in the exchange of correspondence set forth in the appendices hereto. Petitioner's patent attorney disclosed her non-novel idea to anyone who asked. Her disclosures were not made in confidence and they were not of any secret information which could possibly give her any competitive advantage over others.*

Further, there is a complete failure of any showing of use by Respondent of anything, whether secret or not, disclosed to it by Petitioner. In fact, the evidence at the trial was completely to the contrary. Petitioner's initial nonconfidential disclosure was made early in 1957. The only other disclosure to Respondent was made in October of 1958. Respondent spent from December, 1958, until August, 1961, in developing its Party Grill. In a somewhat analogous situation, the Court of Appeals for the Second Circuit in *Speedry Chemical Products, Inc.* v. *Carter's Ink Co.*, 306 F. 2d 328 (2d Cir. 1962) said (p. 334):

> "Speedry's final claim was that Carter used certain business information obtained from them. This is difficult to understand in the light of the fact that Carter's product did not reach the market until eighteen months after the alleged disclosures."**

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* Also misplaced is Petitioner's reliance (P. 28-29) on *Imperial Chemical Industries, Ltd.* v. *National Distillers And Chemical Corp.*, 342 F. 2d 737 (2d Cir. 1965), since the court there recognized the principles already enunciated herein, i.e., that there must be a secret and there must be something that will give a competitive advantage.

** See also to the same effect, *Stevens* v. *Continental Can Co.*, 308 F. 2d 100 (6th Cir. 1962).

Likewise, it is difficult to understand Petitioner's contention here that the knowledge acquired in 1958, that no claims had been allowed and that Petitioner had not then marketed her device, was useful business information to Respondent in the light of the fact that Respondent's Party Grill did not reach the market until almost three years later.

Another essential is novelty. Petitioner's device simply had no novelty. Her ideas, while perhaps new to her, were old in the art, as the jury determined and as the Court below agreed. Therefore, a court cannot imply an agreement by Respondent to pay for using an allegedly novel design when there was no novel design. There can be no trade secret where the Petitioner's idea was well known in the industry. This doctrine was well known to the Court below since its decision in *Baum* v. *Jones & Laughlin Supply*,* 233 F. 2d 865 (10th Cir. 1956).

The Court below correctly determined the elements in a misappropriation case and found that the evidence amply supported the verdict of the jury that there was no confidential disclosure, no disclosure of any novel idea and no use by Respondent of anything disclosed to it by Petitioner. The Court additionally examined Petitioner's theory and noted her attempt to borrow from the trade secret field in an effort to prove in a completely different manner the necessary elements of a misappropriation suit. Petitioner failed because she had no trade secret and because there was no improper taking. She had nothing which would give her any competitive advantage, there was no confiden-

*In accord is *Colgate-Palmolive Company* v. *Carter Products, Inc.*, 230 F. 2d 855 (4th Cir. 1956), cert. denied, 352 U. S. 843; 77 S. Ct. 43; 1 L. Ed. 2d 59 (1956), where Judge Parker said (p. 865):

> "While Fine learned of this at Snell's and communicated his knowledge to Colgate, the process was one which was **well known** and cannot be treated as a **trade secret** or a **confidential disclosure.**" (Emphasis added.)

tial relationship between Petitioner and Respondent and there was no use in the Sunbeam Party Grill of anything disclosed by Petitioner.

Manifestly, therefore, the decision below is correct and there is nothing involved in the proceedings which warrants this Court's use of its power to supervise the lower Federal Courts.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that this Petition for Writ of Certiorari be denied.

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